Supreme Court, U.S.
FILED

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# In The
# Supreme Court of the United States
**October Term, 1998**

WALLACE A. HEUSSER,

*Petitioner,*

v.

MLQ INVESTORS, L.P. a Delaware limited partnership,

*Respondent.*

**Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Supreme Court long ago established a rule that the holder of an FCC broadcast license does not have property rights in the license and, for years afterwards, the lower courts consistently held that the license holder, lacking property rights in the license, could not grant a security interest to encumber it.

With the past few years, the lower courts have developed a doctrine that permits the holder of an FCC broadcast license to grant a security interest in what they have dubbed its "private interest" in the license.

This petition presents a question of first impression---is a voluntary security interest granted in the license holder's so-called "private interest" in an FCC broadcast license choate, as the Supreme Court has required such interests to be to have priority over an IRS tax lien?

# TABLE OF CONTENTS


| | |
|---|---|
| Question Presented | i |
| Table of Contents | ii |
| Table of Authorities | iii |
| Opinion Below | 1 |
| Statement of the Basis of Jurisdiction of the Supreme Court | 1 |
| Statement of the Basis of Federal Jurisdiction in the District Court | 1 |
| Statutory Provisions Involved | 2 |
| Statement of the Case | 2 |
| Reasons to Grant the Writ | 5 |
| Conclusion | 9 |

# TABLE OF AUTHORITIES

Cases

*Beach Television Partners, In re*,
38 F.3d 535, 536-37 (11th Cir. 1994) 6, 7

*FCC vs. Sanders Bros. Radio Station*,
309 U.S. 470, 60 S.Ct. 693 6

*MLQ Investors vs. Pacific Quadracasting, Inc.* 146 F.3d 746 (9th Cir. 1998) 1

*Ridgely Communications, Inc., In re*
139 B.R. 374 (Bankr. D. Md. 1992) 7

*State Street Bank & Trust vs. Arrow Communications, Inc.*, 833 F.Supp. 41
(D.Mass. 1993) 6, 7

*Thomas Communications, In re*,
161 B.R. 621 (Bankr. S.D. W. VA. 1993) 6, 7

*United States vs. McDermott*,
507 U.S. 447, 113 S.Ct. 1526 (1995) 5, 8

*United States vs. New Britain*,
347 U.S. 81, 74 S.Ct. 367 (1954) 5

*United States vs. Pioneer American Ins. Co.*, 74 U.S. 84, 83 S.Ct. 1651 (1963) 5

*United States vs. Security Trust & Savings Bank*, 340 U.S. 47, 71 S.Ct. 111 (1950) 5, 7, 8

*In re Walter Cheskey*, 9 F.C.C.R. 996 (1994) 6, 7, 8

TABLE OF AUTHORITIES (Cont.)

Statutes


| | |
|---|---|
| 26 U.S.C. § 6323(h)(1) | 2, 5 |
| 28 U.S.C. § 1254 | 1 |
| 28 U.S.C. § 1332 | 1 |

## OPINION BELOW

The opinion of the United States Court of Appeals that this petition concerns is published at *MLQ Investors vs. Pacific Quadracasting, Inc.* 146 F.3d 746 (9th Cir. 1998)(Exhibit A, pp. 1a to 9a). The Order denying the Petitioner's petition for rehearing is Exhibit B, p. 10a. The unpublished opinion of the United States District Court for the Eastern District of California, Fresno Division, is Exhibit C, pp. 11a to 15a.

## STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory basis for the Court's jurisdiction is 28 U.S.C. §1254. The United States Court of Appeals for the Ninth Circuit issued its opinion on July 13, 1998. The Petitioner filed a timely Petition for Rehearing with the United States Court of Appeals for the Ninth Circuit on July 23, 1998. The United States Court of Appeals for the Ninth Circuit denied that petition in an order it filed on August 21, 1998. This petition was filed within ninety days afterwards. As such, the petition is timely.

## STATEMENT OF THE BASIS OF FEDERAL JURISDICTION IN THE DISTRICT COURT

The statutory basis for federal jurisdiction in the district court was Title 28 U.S.C. 1332--diversity of citizenship.

## STATUTORY PROVISIONS INVOLVED

Section 6323(h)(1) of the Internal Revenue Code provides, in pertinent part, that "a security interest exists at any time . . . if, at such time, the property is in existence."

## STATEMENT OF THE CASE

In 1988, the corporate owners of several radio stations borrowed money from MLQ Investors' ("MLQ") predecessor in interest. The loan documents purported to grant, to the extent permitted by law, a security interest in all of the station owners' intangible personal property, including, specifically, all Federal Communications Commission ("FCC") broadcast licenses. Upon default, the loan documents authorized the lender to enforce its rights in the collateral by obtaining a judgment of a court of competent jurisdiction enabling a sale of the collateral and applying the proceeds to the debt. In its complaint, MLQ admitted that it could only enforce the interest it claimed in the FCC licenses using the district court's equitable powers to grant extraordinary remedies.

MLQ's predecessor in interest filed financing statements as necessary to perfect its security interests under California law. It also filed continuation statements as necessary to maintain the continuous perfection of its security interests under state law. Between 1988 and 1994, the station owners defaulted on the loans. They also failed to pay certain taxes owed to the IRS including taxes that they had withheld from the wages of employees. Wallace Heusser is personally liable for a

substantial portion of these taxes. Between 1991 and 1994 the IRS recorded several federal tax liens. The IRS recorded the first of these in 1991.

The failure of the station owners to pay federal taxes was a default under the terms of the loan agreements with MLQ's predecessor in interest. Those agreements granted MLQ's predecessor in interest a right to require reports and to inspect books that would have revealed the failure of the station owners to pay taxes. The record is not clear whether MLQ or its predecessor in interest ever required the reports or inspected the books. However, it is clear that MLQ and its predecessor in interest were either aware that the station owners were not paying their federal taxes or did not bother asking where inquiry would have been easy.

Wallace Heusser is a major shareholder in the corporate owners of the radio stations. He is also a guarantor of the loans held by MLQ. In 1994 MLQ commenced a receivership action in the United States District Court for the Eastern District of California, Fresno Division. The receiver in that action sold all of the assets of the corporations. These assets included several Federal Communications Commission ("FCC") broadcast licenses. The sales proceeds were insufficient to pay MLQ's debt in full.

After the receiver sold the assets and the proceeds were collected, MLQ made a motion for an order authorizing the receiver to disburse the sales proceeds to MLQ. Heusser opposed this motion. Among his reasons for opposing MLQ's

motion was Heusser's contention that MLQ's lien on the FCC licenses did not become choate until the receiver sold the licenses--an event that occurred after the IRS recorded its liens. Therefore, Heusser argued, MLQ's lien rights were subordinate to the IRS's rights under its federal tax liens. The District Court disagreed. The court found that, while MLQ could not have a security interest in the FCC licenses, it could and did have a security interest in "the intangible property right of the borrower to the sale proceeds of the FCC license." (Appendix, p. 12a).

Upon entry of the order authorizing and directing him to do so, the receiver disbursed the sales proceeds to MLQ. After entry of a final judgment, Heusser filed a timely notice of appeal.

Before the United States Court of Appeals for the Ninth Circuit, Heusser again argued, among other things, that MLQ's security interest in the proceeds of the FCC broadcast licenses did not become choate until the licenses were sold. The Court of Appeals also disagreed with Heusser and it affirmed the lower court. The Court of Appeals agreed that MLQ could not have security interest in the FCC licenses. However, the Court of Appeals found that MLQ could and did have a security interest in the borrowers' "private rights" in the licenses and that the sales proceeds were proceeds of those private rights. (Appendix, pp. 1a to 9a).

## REASONS TO GRANT THE WRIT

The decision of the United States Court of Appeals for the Ninth Circuit that this petition concerns is irreconcilably inconsistent with the law as announced by the Supreme Court in the cases of *United States vs. McDermott*, 507 U.S. 447, 113 S.Ct. 1526 (1995); *United States vs. Pioneer American Ins. Co.*, 74 U.S. 84, 83 S.Ct. 1651 (1963); *United States vs. New Britain*, 347 U.S. 81, 74 S.Ct. 367 (1954); *United States vs. Security Trust & Savings Bank*, 340 U.S. 47, 71 S.Ct. 111 (1950). Ironically, the lower court opinion cites both *McDermott* and *New Britain* to support its conclusion. (Appendix, Exhibit A, pp. 7a and 8a). Both cases can properly be cited to support the general rule that in determining the priority of competing interests first in time is first in right. However, in citing these cases for that proposition, the lower court failed to understand and apply the exception to the general rule carved out by the Supreme Court when it announced these decisions. A failure to correct this error will inevitably lead others to make the same mistake.

The Supreme Court has consistently held that, to have priority over a federal tax lien, other interests must be choate. *McDermott*; *Pioneer American Ins. Co.*; *New Britain*; and *Security Trust*. The Internal Revenue Code is consistent with this rule. It provides, in Section 6323(h)(1), which defines those security interests that take priority over a federal tax lien, that "a security interest exists at any time . . . if, at such time, the property is in existence." The converse is also true. In

other words, a security interest does not exist until the property to which it purports to attach exists.

The Supreme Court has also held that the owner of an FCC broadcast license does not have property rights in the license. *FCC vs. Sanders Bros. Radio Station*, 309 U.S. 470, 60 S.Ct. 693. For years, the lower courts had consistently held that, lacking any property rights in the license, an FCC license holder cannot create a security interest in the license. These cases are discussed *In re Beach Television Partners*, 38 F.3d 535, 536-37 (11th Cir. 1994). Neither the FCC nor any court has ever disputed the continuing vitality of the rule of law that prevents a license holder from granting a security interest that attaches to the license. The FCC has formally recognized the right of a secured creditor to enforce a security interest in the proceeds of an FCC broadcast license after the license has been sold. *In re Walter Cheskey*, 9 F.C.C.R. 996 (1994). Several lower courts, including, in the case that this petition concerns, the United States Court of Appeals for the Ninth Circuit, have held that a license holder can grant a security interest in the proceeds of an FCC broadcast license and that the perfection of that interest relates back to the time the creditor filed its financing statement without regard to when the proceeds come to exist. These courts carefully avoid any direct challenge to the rule that no security interest can attach to the license. As a device to distinguish their cases from that rule, the lower courts have created a legal fiction--the license holder's "private rights" in the license. *Beach Television Partners*; *State Street Bank & Trust vs. Arrow Communications, Inc.*, 833 F.Supp. 41 (D.Mass. 1993); *In re Thomas Communications*, 161 B.R. 621

(Bankr. S.D. W. VA. 1993); and *In re Ridgely Communications, Inc.* 139 B.R. 374 (Bankr. D. Md. 1992). Although they acknowledge that these "private rights" are intangible, the lower courts have deemed them sufficiently real--in existence--to permit them to serve as an anchor so that, when the debtor someday sells the license, the perfection of the security interest in the proceeds relates back to the date on which the security interest in these "private rights" was ostensibly perfected. *Id.*

The use of a legal fiction to sort out the priority of various state created interests may be justifiable. However, as a device for giving state created interests priority over federal tax liens, the lower courts' "private rights" fiction is exactly the kind of "judicial reasoning" that the Supreme Court rejected in *Security Trust*. 347 U.S. at 350. In *Security Trust*, the Court dealt with the state law doctrine that a judgment lien based on a judgment entered in a case where an attachment lien was issued relates back for perfection purposes to the date the attachment lien was recorded. The Court noted that an attachment lien does not represent money actually determined to be owed. The attachment lien becomes enforceable if, and only if, the court later enters a judgment. It is a "mere caveat of a more perfect lien to come." 340 U.S. at 50.

The case that this petition concerns does not differ from *Security Trust* in any legally significant sense. According to *Cheskey*, on which the Ninth Circuit relied heavily in reaching its decision, the grantee of a security interest in the license holders' rights to its FCC license, "has no rights over the

license itself, nor can it take any action under its security interest until there has been a transfer which yields proceeds subject to the security interest. . . [W]hen a creditor exercises his security interest, the licensee will no longer be the holder of the license." 9 F.C.C.R. at 986. For the holder of a security interest such as the lower courts have permitted MLQ to enforce here to have any exercisable rights, one of two things must happen. Either the license holder must voluntarily sell the license or they must obtain judicial intervention. These are events that may never occur. Until they do, the lien on the "private rights" in the license is a "mere caveat of a more perfect lien to come." 340 U.S. at 50.

In *McDermott*, the Court described the substantial difference between the IRS as a lien holder and voluntary lenders. "The Government . . . cannot indulge in the luxury of declining to hold the taxpayer liable for his taxes; notice of a previously filed security agreement does *not* enable the Government to protect itself." Here, the facts accentuate the distinction. MLQ and its predecessor in interest not only had the opportunity to choose not to be owed money. In addition, they had the right, reserved in the loan documents, to prevent the borrowers from owing the IRS money. MLQ could have monitored the debtors' finances and declared a default immediately upon the debtors' first failure to pay their taxes. Even more easily, MLQ could have declared a default immediately upon the filing of the first IRS tax lien. In either event, MLQ would have What drove the Petitioner's conduct reduced the federal taxes owed by the debtors. MLQ did

neither. It failed to protect itself. Having failed, it has no right to complain at being subordinated to the IRS tax lien.

Both the Petitioner and MLQ could have prevented the IRS from being owed money. What drove the Petitioner's conduct, in hindsight, was clearly an unreasonably optimistic expectation that he would be able to return the stations to profitability and pay their bills. Their optimism renders such people indifferent to any thought of the consequences of failure. In stark contrast, MLQ, and similarly situated creditors, can be presumed to be driven by an enlightened self interest. If the Court arms them with the knowledge that they must do so to protect their financial interests, such creditors will promptly and systematically insure that their borrowers do not materially default in the payment of their taxes.

## CONCLUSION

The United States Court of Appeals for the Ninth Circuit has failed to understand and properly apply relevant Supreme Court authority. In aggravation, the Ninth Circuit has cited two of the cases it apparently does not understand to support its conclusion. The Court should grant this petition, review the Ninth Circuit's decision in this case, and correct the lower court's error.

Respectfully submitted,

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APPENDIX EXHIBIT A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 96-16556

MLQ INVESTORS, L.P. a Delaware limited partnership,

Plaintiff-Appellee,

vs.

PACIFIC QUADRACASTING, INC., a California corporation,
Defendant,

and

WALLACE A. HEUSSER,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of California
Oliver W. Wanger, District Judge, Presiding

Argued and Submitted
February 12, 1998-San Francisco, California

Filed July 13, 1998

Before: Joseph T. Sneed, Alex Kozinski, and David R. Thompson, Circuit Judges

Opinion by Judge Sneed

SUMMARY

COUNSEL

David R. Jenkins, Motschiedler,Michaelides & Wishon, Fresno, California, for the defendant-appellant.

Patricia H. Lyon, French, Lyon & Associates, San Francisco, California, for the plaintiff-appellee.

OPINION

SNEED, Circuit Judge:

Wallace A. Heusser is an owner and guarantor of sever corporations that defaulted on loans from MLQ Investors' ("MLQ") predecessor in interest. In a receivership action commenced by MLQ, a court-appointed receiver sold all the assets of the corporations' radio stations. Heusser appeals the district court's orders directing the receiver to distribute to MLQ all the proceeds from the sale, including proceeds from the sale of the radio stations' Federal Communications Commission ("FCC") broadcast licenses.

Because we find that a lender may perfect a security interest in the proceeds from a radio station's broadcasting license and that MLQ perfected its security interest in the debtor's intangible property prior to the filing of tax liens by the Internal Revenue Service ("IRS"), we affirm the district court's judgment.

I.

## FACTUAL AND PROCEDURAL BACKGROUND

In late 1988, the corporate owners of several radio stations entered into a loan agreement with MLQ's predecessor in interest. The loan documents purported to create a security interest in the station owners' intangible personal property, including all FCC broadcast licenses, to the extent permitted by law. In the event of a default, the lender was authorized to obtain a judgment of a court of competent jurisdiction enabling it to sell the collateral and apply the proceeds to the outstanding debt.

Between 1988 and 1994, the station owners defaulted on the loans and failed to pay taxes to the IRS. MLQ's predecessor in interest perfected its security interest under the loan documents in December 1988 and January 1989, and under subsequently filed continuation statements. The IRS' first tax lien on the station owners' property arose in 1991. The station owners' debt to MLQ exceeded the combined value of the owners' assets.

In 1994, MLQ filed suit against the station owners and two guarantors, including Heusser, for breach of contract, foreclosure of a security interest, and breach of guarantees. MLQ also sought the appointment of a receiver and injunctive relief. In May, 1994, the district court appointed a receiver and issued a preliminary injunction authorizing the receiver to perform his duties. The parties stipulated that the proceeds were to be distributed according to bankruptcy law and that case would be referred to a magistrate judge for all purposes,

including the issuance of final orders.

On November 15 and 22, 1994, the district court entered orders authorizing the receiver to sell all the assets of the radio stations as a private sale, after securing FCC approval for transfer of the broadcast licenses. On December 1, 1994 and January 5, 1995, the district court entered orders directing the receiver to disburse the sales proceeds to MLQ.

The receiver dutifully disbursed the sales proceeds to MLQ, and on April 5, 1996, the district court entered an order approving the receiver's Final Report of Administration and Accounting ("Final Report"). A stipulation and order dismissing the case was entered on July 2, 1996. Heusser filed a notice of appeal on July 31, 1996.

## II.

## STANDARD OF REVIEW

We review the district court's determination of questions of law de novo. *See, Torres-Lopez v. May*, 111 F.3d 633, 638 (9th Cir. 1997).

## III

## DISCUSSION

### A. The Timeliness of Appeal

As a threshold matter, MLQ argues that the receiver's Final Report constituted a final order that resolved all substantive issues in the case. As a result, Heusser's failure to appeal within 60 days of the April 5 filing of the report deprives this court of jurisdiction to review the disbursement orders entered earlier in the case. We find this argument has no merit.

The Final Order terminated the receivership, but it did no dispose of all of MLQ's claims--such as MLQ's claim for breach of guarantees. Moreover, the district court did not enter judgment on the claims under Fed. R. Civ. P. 54(b). The court did not "terminate the action as to any of the claims or parties" under the rule and, as a result, Heusser was barred from appealing the court's disbursement orders until the entire case was dismissed on July 2, 1996. *See, Chacon v. Babcock*, 640 F.2d 221, 222 (9th Cir. 1981). The timely appeal was then filed on July 31, 1996. Therefore, this court has jurisdiction to review the disbursement orders.

B. Perfecting Security Interest in a Broadcasting License

Heusser argues that a debtor cannot create a voluntary security interest in an FCC broadcasting license because doing so wold be inconsistent with federal laws that limit the transfer of such licenses. However, this argument is directly contrary to the holding of *In re Ridgely Communications, Inc.*, 139 B.R. 374, 379 (Bankr. D. Md. 1992), which held that a creditor may perfect a security interest in a debtor's FCC broadcasting license to the extent that the creditor seeks to protect its interest in the proceeds of the debtor's license. In reaching this result,

the bankruptcy court recognized a "public/private" distinction between a licensee's right to transfer its license (a "public" right between the FCC and the licensee which is governed by the FCC) and the licensee's right to receive remuneration for a transfer (a "private" right between two parties). *See, id.* at 378-79. In other words, the FCC may prohibit security interests in licenses themselves because the creation of such an interest cold result in foreclosure and transfer of the license without FCC approval. Such approval is necessary to regulate the airwaves in the public interest. No such public interest is implicated, however, by a security interest in the proceeds of licenses, which does not grant the creditor any power or control over the license or the segment of the broadcast spectrum it represents. The FCC has explicitly adopted this reasoning. *See, In re Cheskey*, 9 F.C.C.R. 986, 987 (1994)(holding that licensee may give security interest in the proceeds of sale of license, but not in the license itself).

The district court in the present case followed the reasoning of *In re Ridgely* and *In re Cheskey* and held that MLQ had a perfected security interest in the proceeds of the sale of the FCC broadcasting licenses. The reasoning of these cases is sound, and while the issue they present is one of first impression in this circuit, analogous authority supports the district court's conclusion. *See, e.g., Freightliner Mkt. Dev. Corp. v. Silver Wheel Freightlines, Inc.*, 823 F.2d 362, 369 (9th Cir. 1987) (holding that a creditor may perfect a security interest in proceeds of sale of transportation operating authorities where security agreement and financing statement listed "general intangibles" as part of security). Although the

Seventh Circuit has ruled that a creditor may not hold a security interest in an FCC license, the court based its conclusion on the FCC's former opposition to such interests. *See In re Tak Communications, Inc.*, 985 F.2d 916, 918 (7th Cir. 1993). Because the FCC explicitly repudiated both that policy and *In re Tak* in *In re Cheskey*, 9 F.C.C.R. at 987 & n. 8, we do not find *In re Tak* persuasive. *See Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1134-35 (9th Cir. 1988)(en banc)(we need not follow circuit precedent that had been based on a prior agency interpretation). Therefore, we find that the district court did not err in reaching its conclusion.

C. MLQ's Security Interest and the IRS Tax Liens

Heusser argues, however, that even if MLQ had a security interest in the proceeds from the sale of the licenses, this interest did not arise, and therefore could not be perfected, until the licenses were sold. As a result, MLQ's security interest was junior to the IRS tax liens created prior to the sale of the licenses. We disagree.

Government licenses, as a general rule, are considered to be "general intangibles" under the Uniform Commercial Code, "i.e., personal property rights in which security interests may be perfected." *In re Ridgely*, 139 B.R. at 379. As discussed *supra*, *In re Ridgely*, makes it clear that license holders have no property rights in the "actual broadcast frequencies themselves as against the federal government," 139 B.R. at 376, (*citing, In re Bill Welch*, 3 F.C.C.R. 6502 (1988)). However, *In re*

*Ridgely* and *In re Cheskey* stand for the proposition that licensees do have a proprietary right in the proceeds from a sale of a license, and may grant a security interest in those proceeds. *See also In re Beach Television Partners*, 38 F. 3d 535, 537 (11th Cir. 1994)(holding that a creditor has a valid security interest in the proceeds of an FCC-approved sale of a broadcast license).

Since the licensee has rights and interests in the license proceeds which include a limited right to pledge those proceeds as collateral, we see no reason why the proceeds should not be considered "general intangibles," therefore subject to perfection prior to sale. Indeed, a contrary outcome would mean that the distinction between private and public interests in FCC license proceeds, outlined in *In re Ridgely* and *In re Cheskey*, would have no meaning, and the private interests would be devoid of value. A security interest in proceeds that could not be perfected until after foreclosure and sale of the license would, in almost every circumstance, be primed by IRS liens and claims of other creditors. The fact that in the present case the actual dollar proceeds from the sale of the licenses were generated only after the sale--and thus, after the tax lien filing, as well--is immaterial. "[N]early all forms of security mus be reduced to cash before they pay of the debt secured thereby." *See*, Peter F. Coogan, *Tax Liens and the UCC*, 81 Harv. L.Rev. 1369, 1385 (1968).[1]

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[1]MLQ's perfected interest in the debtor's "intangibles" is distinguishable from a security interest in "after acquired property." Under Uniform Commercial Code § 9203(1) & (2), such interests are "generally not considered perfected when the financing statement is filed, but only when the security interest has attached to particular property upon the debtor's acquisition of that

It is undisputed that MLQ's security agreement with the debtor was entered into prior to the dates the IRS filed notices of its tax liens on the debtor's property. MLQ also filed the financing statements necessary to perfect the interest prior to the IRS filing notices of its tax liens. Absent provision to the contrary, "priority for purposes of federal law is governed by the comon-law principle that 'first in time is first in right.'" *See United States v. McDermott*, 507 U.S. 447, 449 (1993), *citing United States v. New Britain*, 347 U.S. 81, 85 (1954).

## CONCLUSION

A creditor may obtain a security interest in the proceeds of the sale of an FCC license, and such an interest constitutes a "general intangible" that may be perfected prior to sale o the license. Because MLQ perfected its security interest in the debtor's "general intangibles" before the IRS filed its tax liens, MLQ's interest prevails.

AFFIRMED

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property." *See, United States v. McDermott*, 507 U.S. 447, 452 (1993). In contrast, because the debtor in the present case enjoyed a limited right to pledge its FCC broadcasting licenses as collateral, MLQ's interest was "in existence" and "attached" at the time it filed its financing statement. *See*, 26 U.S.C. § 6323(h)(1).

APPENDIX EXHIBIT B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 96-16556

| | |
|---|---|
| MLQ INVESTORS, L.P. a Delaware limited partnership, | ) **FILED** |
| | ) **AUG 21, 1998** |
| | ) **CATHY A. CATTERSON, Clerk** |
| Plaintiff-Appellee, | ) **U.S. Court of Appeals** |
| vs. | ) |
| | ) |
| PACIFIC QUADRACASTING, INC., a California corporation, Defendant, | ) |
| | ) |
| and | ) |
| | ) |
| WALLACE A. HEUSSER, | ) |
| | ) |
| Defendant-Appellant. | ) |

Before: SNEED, KOZINSKI and THOMPSON, Circuit Judges

Appellant's petition for rehearing is denied.

APPENDIX EXHIBIT C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| MLQ INVESTORS, L.P., a Delaware limited partnership,<br><br>Plaintiff<br>v.<br><br>PACIFIC QUADRACASTING, a California Corporation; GOLDEN BEAR-1 BROADCASTING, INC., a California Corporation; WALLACE A. HEUSSER, an individual; and STEPHEN MARRIOTT, an individual,<br><br>Defendants. | CV-F-94-5413-DLB<br><br>ORDER AUTHORIZING RECEIVER TO DISBURSE SALE PROCEEDS TO SECURED CREDITOR MLQ INVESTORS, L.P. |

Plaintiff, MLQ Investors, L.P. (MLQ) brought this motion seeking an order of the court authorizing the receiver to disburse to MLQ the net proceeds from the sale of KKDJ and KZHT, two FM radio broadcast stations operated by Defendants, Pacific Quadracasting, Inc. (Pacific) and Golden Bear-1 Broadcasting, Inc. (GB-1). By prior order of the court the proposed sales of these two stations were approved. It appears, however, that the proceeds of the sales will constitute only a fraction of the total debt which now exceeds $7,000,000.00.

It is uncontested that MLQ is a secured creditor of both Pacific and GB-1 and that the total sum of the debt far exceeds the proceeds of the sale of the two stations. Nor is it disputed

that debtors were in default under the loan agreements or that the sale of the stations is appropriate. Finally, it is agreed that the security interest extends to tangible and intangible assets of the debtor corporations and that the loan documents contemplate sale of the assets and payment to the secured creditor under the loan documents in the event of default.

Two objections were filed in opposition to Plaintiff's motion to disburse the proceeds of the sale. The first by a judgment creditor of Pacific Quadracasting, Robert O. Franklin. The second objection was filed by Walter Heusser, who both holds substantial unsecured claims against the debtor corporations, Pacific, GB and GB-1 and is a co-obligor on various claims against the same corporations.

Mr. Franklin maintains, relying on general principals law requiring marshalling of assets, that the proceeds of the sale should not be disbursed until MLQ has demonstrated that there are no other assets including guarantees by individual shareholders against which MLQ may proceed before it may proceed against the assets of Pacific under the security agreement. Mr. Franklin maintains that to proceed otherwise would be to his disadvantage as well as the disadvantage of other unsecured creditors since MLQ may have access to assets to satisfy the debt owed to it which are unavailable to Mr. Franklin or other unsecured creditors. Mr. Franklin cites no authority in support of his position and in fact, the provisions of the guarantee agreements as well as the general principles of surety law may require MLQ as creditor to proceed against the secured assets before the individual guarantors. In any event,

the point appears to be academic since the sales proceeds, as mentioned above, are ony a frantion of the entire debt owed to MLQ and several million dollars of debt will reain even after sale of the stations involved. Additionally, there is no indication that any of the guarantors will have sufficient assets to satisfy the remainder of the indebtedness. Thus, the court determines that Mr. Franklin's objection is without merit.

Mr. Heusser's objection relates only to that undetermined portion of the sale proceeds which is attributable to the Federal Communications Commission (FCC) broadcast license.

Mr. Heusser's argument is based upon the principle enunciated *In re Tak Communications, Inc.*, 138 B.R. 568 (W.D. WI. 1992) wherein the District Court held hat a secured creditor had no right to exercise its security interest in an FCC broadcast license by taking possession of or directly transferring the license. The court, in *Tak*, reasoned that such liens would interfere with the FCC's regulation of its licenses, the court also declined to recognize a limited lien interest in the sale proceeds of the license.

The second prong of Mr. Heusser's objection is the stipulated order in this action that the proceeds of any sales or any other assets gathered by the receiver would be dealt with as if a bankruptcy had been filed on May 4, 1994. Mr. Heusser argues that pursuant to 11 U.S.C. § 552 the sale proceeds attributable to the FCC licenses are after acquired property. He maintains since a secured creditor has no security interest in the

FCC license that the only property a creditor may proceed against is the payment received after the sale of the license which is a property right created only upon the sale of the license or the station as a going concern. Mr. Heusser, therefore, argues that the portion of the proceeds of the sale which are attributable to the transer of the FCC license are not subject to the security agreement and should be distributed pro rata to unsecured creditors.

The better reasoned position, however, is that a secured creditor may establish a security interest in the intangible property rights of the borrower to the sale proceeds of the FCC license. This proposition is discussed and supported by the courts' rulings in *State Street Bank & Trust Co. v. Aero Communications, Inc.* 833 F.Supp. 41 (D.MA. 1993) and *In re Ridgely Communications, Inc.*, 139 B.R. 374 (B.C. MD. 1992). FCC rulings have also approved the appointment of a receiver in order for a lender to enforce its rights to the collateral through a court supervised sale. *D.H. Overmyer Telecasting Co., Inc.*, 94 FCC Rep.2d 117 (1983) and the establishment of a secured interest in the proceeds of the sale of a FCC license, *Walter O. Cheskey and Triad Cellular L.P.*, file no. 03992-CL-AL-1-93, 77 R.R. 2d 1031.

This court specifically adopts the reasoning of *Ridgley* and *State Street Bank & Trust* and finds that a secured creditor may establish a secured interest in the intangible property right of the debtor to the proceeds or value of the FCC license. Accordingly, I find that the proceeds of the sale are not after acquired property and are subject to MLQ's secured interest.

Accordingly, good cause therefore appearing, this court grants MLQ's motion to disburse sale proceeds to it as secured creditor.

IT IS HEREBY ORDERED as follows:

(1) MLQ Investors, L.P.'s (MLQ) motion for an order disbursing sale proceeds o FM broadcast station KKDJ (105.9 MHz) in Fresno County, California (the Fresno station) operated by Defendant, Pacific Quadracasting, Inc. (Pacific Quadracasting) and FM broadcast station KZHT (94.9 MHz) in Provo, Utah (the Utah station) operated by Defendant, Golden Bear-1 Broadcasting (GB-1) is hereby granted.

(2) The receiver is authorized to immediately distribute the estimated net sale proceeds of the Fresno station and the Utah station to MLQ as senior secured lender. Reserving for the receivership sufficient funds to pay anticipated administrative expenses and costs of sale.

(3) After payment of the administrative expenses and upon court approval of such payment of such administrative expenses, the Receiver shall distribute any remaining proceeds of the sale of the receivership estate to MLQ.

DATED: 11/29/94

S\ _____
DENNIS L. BECK
U.S. MAGISTRATE JUDGE

Supreme Court, U.S.
FILED
DEC 21 1998
OFFICE OF THE CLERK

No. 98-840

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

WALLACE A. HEUSSER,

*Petitioner,*

*vs.*

MLQ INVESTORS, L.P., a Delaware limited partnership,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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## LIST OF PARTIES

Parties in the proceedings before the Ninth Circuit and in the District Court who are not parties in this present mattter are:

Stephen Marriott, an individual, as a defendant

Pacific Quadracasting, Inc., a California corporation, as a defendant

Golden Bear Broadcasting, Inc., a California corporation, as a defendant

Golden Bear-1 Broadcasting, Inc., a California corporation, as a defendant.

## STATEMENT PURSUANT TO RULE 29.6

Respondent MLQ Investors, L.P., is a Bermuda limited partnership. MLQ, LLC, a Delaware limited liability company, is the sole general partner of Respondent.

## TABLE OF CONTENTS


| | Page |
|---|---|
| List of Parties | i |
| Statement Pursuant to Rule 29.6 | ii |
| Table of Contents | iii |
| Table of Cited Authorities | iv |
| Statute Involved | 1 |
| Rule 15.2 Statement | 1 |
| Reasons for Denying the Writ | 3 |
| I. The Court Below Correctly Determined That, Under State Law, The Respondent Creditor Obtained A Security Interest In The Debtors' General Intangible Rights To Transfer Their Broadcast Licenses Subject To FCC Approval. | 3 |
| II. The Court of Appeals Below Correctly Applied The Test Enunciated By This Court Regarding Priority Of Security Interests Under 26 U.S.C. § 6323(a). | 6 |
| III. No Sound Purpose Would Be Served By Changing Established Commercial Law And FCC Practice To Institute A Requirement That Commercial Lenders Police Their Debtors' Payment Of Federal Taxes. | 8 |

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*D.H. Overmyer Telecasting Co. Inc.*, 94 F.C.C. 2d 117 (1983) ..... 1, 4

*FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940) ..... 4, 5

*Freightliner Market Development Corp. v. Silver Wheel Freightlines, Inc.*, 823 F.2d 362 (9th Cir. 1987) ... 3, 4, 7

*In re Dillon, Receiver*, 42 F.C.C. 2d 203 (1973) ..... 4

*In re Ridgely Communications, Inc.*, 139 B.R. 374 (Bkrtcy. D. Md. 1992) ..... 3, 4, 7

*In re Walter Cheskey*, 9 F.C.C.R. 986 (1994) ..... 3, 4, 5, 7

*La Rose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974) .... 1, 4

*Regents of University System of Georgia v. Carroll*, 338 U.S. 586 (1950) ..... 3, 4, 5

*United States v. McDermott*, 507 U.S. 447 (1995) .... 6, 7

*United States v. New Britain*, 347 U.S. 81 (1954) .... 6

*United States v. Pioneer American Ins. Co.*, 374 U.S. 84 (1963) ..... 6, 7

*United States v. Security Trust & Savings Bank*, 340 U.S. 47 (1950) ..... 6, 7

*Cited Authorities*

*Page*

**Statute:**

26 U.S.C. § 6323(a) ..... 1, 2, 6, 7, 8

**Rule:**

Supreme Court Rule 15.2 ..... 1

Respondent MLQ Investors, L.P. ("MLQ" or "Respondent"), respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 146 F.3d 746 (1998).

## STATUTE INVOLVED

Section 6323(a) of the Internal Revenue Code (26 U.S.C., *et seq.*) provides:

> The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.

## RULE 15.2 STATEMENT

In compliance with Rule 15.2's requirement that Respondent "address any perceived misstatement of fact . . . in the petition that bears on what issues properly would be before the Court," the following is offered:

1. *Foreclosure Procedures*: Petitioner's statement characterizing the receivership action below is misleading. (*See* Petition at 2.) MLQ's filings urged use of, and the district court decided to employ, the procedures endorsed by the FCC to facilitate transfer of a debtor's broadcast licenses after a licensee's default to a creditor. *See D.H. Overmyer Telecasting Co. Inc.*, 94 F.C.C. 2d 117, 123 (1983); *La Rose v. FCC*, 494 F.2d 1145, 1147-48 (D.C. Cir. 1974).

2. *IRS tax liens*: The record below does not support Petitioner's assertion that "the IRS recorded several federal tax liens." (Petition at 3.) The record simply indicates that the IRS

filed a proof of claim with the receiver for $623,703.66 allegedly owed by the radio stations. (AE 98.)[1] The record does not contain any evidence that the IRS filed a notice of lien pursuant to 26 U.S.C. § 6323(a).

3. *Respondent MLQ's Obligation to Ensure Petitioner Paid Federal Taxes*: Petitioner's allegation that MLQ had an obligation to police Petitioner's payment of federal taxes (Petition at 3) is not supported by the record. The loan documents between the parties contain no such obligation. (*See* AE 21-84.) Nor is there any support in the record for Petitioner's speculation that MLQ was "either aware that the station owners were not paying their federal taxes or did not bother asking. . . ." (Petition at 3.) The complaint filed by Respondent does not refer to non-payment of taxes as a breach, only to the monetary defaults and the failure of the radio stations to provide required financial reports. (AE 10.)

4. *Priority of IRS Liens Urged in the District Court*: In reference to Petitioner's assertions regarding the existence of federal tax liens (Petition at 4), the District Court's record fails to establish that Petitioner argued MLQ's liens were subordinate to such liens, although this issue was argued in, and disposed of by, the appeal at the Ninth Circuit. (See PA 14a.)[2] In fact, at the District Court hearing on MLQ's motion to disburse proceeds from sale of the station assets, Petitioner dismissed this argument stating that "whether [the IRS] have a lien or not's largely moot." (AE 167.)

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1. References to the Excerpts of Record in the Court of Appeals will be designated as follows: "AE __" as Appellant's Excerpts of Record.

2. References to Petitioner's Appendix in this case will be designated as follows "PA __".

## REASONS FOR DENYING THE WRIT

The Court should decline to accept jurisdiction of this case. It presents no novel or important issues. It was decided by the courts below in accord with settled law. There is no conflict between the law applied by the Ninth Circuit Court of Appeals and that announced by this Court.

### I.

### THE COURT BELOW CORRECTLY DETERMINED THAT, UNDER STATE LAW, THE RESPONDENT CREDITOR OBTAINED A SECURITY INTEREST IN THE DEBTORS' GENERAL INTANGIBLE RIGHTS TO TRANSFER THEIR BROADCAST LICENSES SUBJECT TO FCC APPROVAL.

A broadcast licensee has the right to sell its interest in the license to a third party, provided that the Federal Communications Commission ("FCC") approves the sale. *See Regents of University System of Georgia v. Carroll* ("*Regents*"), 338 U.S. 586, 597 (1950). This right to sell and realize proceeds from the license comes into existence at the time the license is issued to the licensee, not after licensee sells the license. Such right exists whether or not the right is ever exercised. While the right to transfer certainly must exist whenever a sale occurs, that right to transfer is not dependent on any particular sale or transfer occurring. *See In re Walter Cheskey* ("*Cheskey*"), 9 F.C.C.R. 986, 987 (1994); *In re Ridgely Communications, Inc.* ("*Ridgely*"), 139 B.R. 374 (Bkrtcy. D. Md. 1992); *see also Freightliner Market Development Corp. v. Silver Wheel Freightlines, Inc.* ("*Freightliner*"), 823 F.2d 362, 369 (9th Cir. 1987) (government transport authorities confer a property right on licensee).

The limited right to sell a license with FCC approval in order to generate a profit has been determined to be a general

intangible asset in which a creditor may obtain a security interest. *Cheskey*, 9 F.C.C.R. at 987; *Ridgely*, 139 B.R. at 377; *see also Freightliner*, 823 F.2d at 369. Such security interest is perfectible by filing a financing statement in accordance with the UCC. *Id.*

Subject to a significant restriction, the courts and the FCC consistently allow secured creditors of broadcast licensees to enforce duly perfected liens against the assets of such licensees, including the limited right to sell the license with FCC approval and realize proceeds from that sale. *Id.* The major restriction on this practice is the requirement that lien enforcement procedures employed by a creditor cannot infringe on the regulatory authority of the FCC. *See, e.g., D.H. Overmyer Telecasting Co. Inc.*, 94 F.C.C. 2d 117 (1983) (FCC will not disturb the bankruptcy court's appointment of the secured creditor as receiver to preserve creditor's rights); *La Rose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974) (FCC abused discretion when it denied renewal of broadcast license to receiver of licensee in bankruptcy proceeding); see also *In re Dillon, Receiver*, 42 F.C.C. 2d 203 (1973) (FCC will not disturb state court proceedings appointing a receiver for broadcast licensee in order to protect creditors).

The law's recognition of an enforceable security interest in the proceeds of sale of a broadcast license rests on the "public/private" distinction described by the Ninth Circuit in the case below. On one hand, the licensee is not entitled to public rights under that license that would extend beyond the privileges and conditions imposed by the licensing authority. *Regents*, 338 U.S. at 597; *FCC v. Sanders Bros. Radio Station* ("*Sanders*"), 309 U.S. 470, 475 (1940).[3] On the other hand, the licensee is

3. Petitioner erroneously asserts that the Ninth Circuit decision in the present case conflicts with *Sanders*, 309 U.S. 470. *Sanders* simply (Cont'd)

not barred from exercising the private rights all others enjoy under state commercial law to engage in a business and to utilize commercial practices — provided these state private rights do not interfere with the regulatory authority of the FCC. *Regents*, 338 U.S. at 597; *Cheskey*, 9 F.C.C.R. at 987.

It is this "private" right of broadcast licensees that is at issue in the present case. It is the licensees' right to avail themselves of the state business and commercial practices available to all others[4] — as long as the regulatory authority of the FCC over the license is undisturbed. In the exercise of that private right, the licensees can pledge such private rights as collateral. *Cheskey*, 9 F.C.C.R. at 987.

As noted above, Petitioner concedes that fact that MLQ had a duly granted security interest in all personal property of the radio stations, including all general intangibles. Further, Petitioner concedes that MLQ duly perfected its security interest in such property by filing UCC financing statements with the appropriate state agencies. As explained in Section II below, the Ninth Circuit properly determined that these facts established MLQ's right to the distribution of the proceeds of sale of the radio stations before payment to any other creditors.

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(Cont'd)
reiterated that, as against the FCC (i.e., in exercising the public aspect of the license), a licensee had no rights in a license beyond the privilege to use it for the specified term. *Sanders*, 309 U.S. at 475. The issue of the "private" rights at issue in the case below (*e.g.*, the rights of the licensee as to third parties in the conduct of an enterprise) were not at issue in *Sanders*. However the *Sanders* Court recognized in dicta the private/public dichotomy when it noted that "the [Communications] Act does not essay to regulate the business of the licensee." *Id.*

4. In the present case those rights, as established in the forum state of California, were derived from the UCC.

## II.

## THE COURT OF APPEALS BELOW CORRECTLY APPLIED THE TEST ENUNCIATED BY THIS COURT REGARDING PRIORITY OF SECURITY INTERESTS UNDER 26 U.S.C. § 6323(a).

The Ninth Circuit's decision does not conflict with the doctrine of this Court regarding the priority of federal tax liens under 26 U.S.C § 6323(a) as set forth in *United States v. McDermott* ("*McDermott*"), 507 U.S. 447 (1995); *United States v. Pioneer American Ins. Co.* ("*Pioneer*"), 374 U.S. 84 (1963); *United States v. New Britain* ("*New Britain*"), 347 U.S. 81 (1954); and *United States v. Security Trust & Savings Bank* ("*Security Trust*"), 340 U.S. 47 (1950). These cases confirm the established principles that: (a) a federal tax lien does not automatically have priority over other liens; and (b) for purposes of federal law, the priority of federal tax liens over other liens is determined by the common law principal of "first in time is first in right." *McDermott*, 507 U.S. at 449; *Pioneer*, 374 U.S. at 88-89; *New Britain*, 347 U.S. at 85; *Security Trust*, 340 U.S. at 49.

These cases also establish that a creditor is determined to be "first in time" (as measured by the date of perfection, not the date any sale proceeds are realized) if certain conditions are met. As explained in *McDermott*, a lien under state law becomes choate (and therefore perfected) for purposes of taking priority over a subsequently noticed federal tax lien when ". . . [1] the identity of the lienor, [2] the property subject to the lien, and [3] the amount of the lien are established." *United States v. McDermott*, 507 U.S. 447, 449 (quoting *United States v. New Britain*, 347 U.S. 81, 85, and citing *United States v. Pioneer American Ins. Co.*, 374 U.S. 84).[5] The Ninth Circuit

5. Although not cited in *McDermott*, the fourth case cited by Petitioner as inconsistent with the Ninth Circuit determination in the (Cont'd)

correctly applied the perfectibility test articulated in *McDermott*. The first element and third elements were not disputed. (*See* AE 110; PA 3a and 11a.) The final element — the identity of the property subject to the lien — was also satisfied. The parties' loans documents specified that the security interest covered all tangible and intangible personal property of the debtors. (AE 21-84.) As set forth in Section I above, the general intangibles include the private right of the licensee to sell the licenses to a third party. The parties do not dispute that MLQ's lien against general intangibles was duly perfected by the filing of appropriate financing statements.[6] As such, the lien is accorded priority over a later filed federal tax lien under 26 U.S.C. § 6323(a). *McDermott*, 507 U.S. at 449.

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(Cont'd)
present case, *Security Trust*, is also in accord with the test for lien perfection. *Security Trust* explained that a California attachment lien was contingent until a judgment was entered which could set the amount of the lien. As a result, the amount of the lien was not established and, therefore, not perfected for purposes of priority over a later filed federal lien. *Security Trust*, 340 U.S. at 51.

6. Petitioner suggests that there is a conflict between the Ninth Circuit's disposition of the case below and this Court's treatment of the priority of federal tax liens. Petitioner attempts to equate the after-acquired real property in *McDermott*, the after-incurred debt on real property in *Pioneer*, or the "lis pendens" nature of the California attachment lien on real property prior to entry of judgment in *Security Trust*, with the property at issue in the present case. However, no conflict exists since, as explained above, the property at issue in this case has been determined to be general intangibles acquired by the debtor *before* the creditor's lien was perfected. *See* PA 14a; *Cheskey*, 9 F.C.C.R. at 987; *Ridgely*, 139 B.R. at 377; *see also Freightliner*, 823 F.2d at 369.

## III.

## NO SOUND PURPOSE WOULD BE SERVED BY CHANGING ESTABLISHED COMMERCIAL LAW AND FCC PRACTICE TO INSTITUTE A REQUIREMENT THAT COMMERCIAL LENDERS POLICE THEIR DEBTORS' PAYMENT OF FEDERAL TAXES.

Petitioner attempts to impart a wide public interest in the outcome of this case by implying that granting certiorari will protect the interests of the federal government in the collection of taxes. However, despite having filed a proof of tax claim with the district court-appointed receiver for the taxes claimed due, the government has never appeared in any proceeding to assert an interest in the proceeds from the transfer of the three radio stations' licenses. (AE 167-168.) Indeed, the record in this case is silent regarding whether the government actually perfected its tax claim as required by 26 U.S.C. § 6323(a). This raises the prospect that if review is taken and the case decided in Petitioner's favor, the government may still be unable to assert the benefits Petitioner would claim for it.

Further, the Petitioner seeks to punish a secured creditor for a federal tax payment default of its debtor. Petitioner asserts that the secured creditor somehow might have protected itself from a superior federal tax lien claim if it had exercised its default remedies sooner. (Petition at 8.) The record in this case lacks support for this speculation.

Petitioner admits the unique circumstances which gave rise to the present case — that the dispute at issue here arose because, as owner and operator of the radio stations, Petitioner had ". . . clearly an unreasonably optimistic expectation" of financial viability. (Petition at 9.) Petitioner further admits that this rendered him ". . . indifferent to any thought of the consequences of failure". (*Id.*)

These unique facts suggests this case is *sui generis*. Unlike the Court's treatment of other creditors, Petitioner urges the Court to hold creditors of broadcast licensees responsible for policing the licensees' tax payments to the government. To impose such a duty on a creditor in a commercial loan transaction would not advance the law of broadcast licensing, secured transactions, or tax collection.

## CONCLUSION

The petition for writ of certiorari should be denied. No novel issue is presented by the petition. No conflict exists between the Ninth Circuit's decision in the case below and the cases decided by this Court.

Respectfully submitted,

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